Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Presubscribed Interexchange Carrier Charges	)	CC Docket No. 02-53 CCB/CPD File No. 01-12 RM-10131

COMMENTS OF THE
ASSOCIATION OF COMMUNICATIONS ENTERPRISES

The Association of Communications Enterprises ("ASCENT"),[1] through undersigned counsel and pursuant to *Notice of Proposed Rulemaking*, FCC 02-79, released in the above-captioned proceeding on March 20, 2002 ("*NPRM*"), hereby offers the following comments on various proposals to modify the existing $5.00 safe harbor for presubscribed interexchange carrier ("PIC") change charges imposed by incumbent local exchange carriers ("LECs"). ASCENT agrees that the Commission should establish a national, cost-based PIC change safe harbor amount, setting that safe harbor at a level which will allow incumbent LECs to recover costs legitimately associated with the execution of PIC changes. ASCENT strongly objects, however, to any proposal pursuant to which incumbent LECs would be permitted to recover extraneous costs through a PIC change charge as contrary to the pro-competitive underpinnings of the Telecommunications Act.

[1] ASCENT is a national trade association representing smaller providers of competitive telecommunications and information services. The largest association of competitive carriers in the United States, ASCENT was created, and carriers a continuing mandate, to foster and promote the competitive provision of telecommunications and information services, to support the competitive communications industry, and to protect and further the interests of entities engaged in the competitive provision of telecommunications and information services.

As the Commission notes, "the PIC-change charge evolved as a part of the regulatory framework established by the Commission in 1983 to open the interstate telecommunications market to competition."[2] At that time, however, incumbent LECs averred that they had insufficient data available to precisely document the actual costs of executing a PIC change. Accordingly, that regulatory framework could not "establish either actual carrier costs or the forecasts on which their proposed rates were based."[3] Notwithstanding its inability to definitively establish the actual costs associated with executing a PIC change at that time, it was not the Commission's intent to establish a profit center for incumbent LECs. Indeed, quite the opposite is true.

From its first consideration of the appropriate charges which incumbent LECs would be allowed to assess in connection with executing a PIC change, the Commission has evidenced a desire to limit such charges to the costs incurred by the incumbent LEC to actually execute the PIC change. Thus, the Commission made the narrow holding that "it was reasonable for carriers to recover *costs* associated with changing an end user's presubscribed IXC."[4] In establishing the $5.00 PIC change safe harbor in 1984, the Commission was establishing a charge which "represents the best approximation . . . that this Commission is capable of devising within a reasonable period of time."[5] As the Commission also made clear at that time,

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2 *NPRM*, ¶ 2.

3 Id.

4 Id., ¶ 3 (emphasis added).

5 MTS and WATS Market Structure (Third Report and Order), 93 F.C.C.2d, ¶ 54 (1982).

> [The Communications Act] assumes that rates will be finally decided within a reasonable time encompassing months, occasionally a year or two, but not several years or a decade. The standard of 'just and reasonable' rates is subverted when the delay continues for several years.[6]

Thus, a safe harbor PIC change charge which was not based on actual costs was intended to represent merely a stop-gap effort until such time as an actual cost-based determination could be made. Unfortunately, in the nearly two decades since, the Commission has considered the appropriateness of the PIC change charge only once, within the context of its review of the LECs' 1985 revised annual interstate access tariffs. Those filings "proposed increases to the individual carrier PIC-change charges,"[7] which increases were rejected by the Commission as not justified by cost showings proferred by incumbent LECs. Since that time, "the Commission has not reviewed the reasonableness of the $5 safe harbor on PIC-change charges."[8] The reduction in the PIC change charge to the actual costs associated with execution of the PIC change is thus long overdue.

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6 Id., ¶ 53.

7 *NPRM*, ¶ 4.

8 Id.

ASCENT agrees with the Commission that "significant industry and market changes have occurred since the implementation of the [$5.00] safe harbor in 1984."[9] Certain basic concepts, however, remain unchanged. For example, the Commission remains committed to its "primary goals of promoting competition and eliminating discrimination,"[10] Congress still "expect[s] this Commission to follow policies which would minimize the cost of communications services to ultimate users,"[11] and "cost-based rates" still "provide correct signals to the marketplace."[12] It also remains true that "[t]he concept that users of the local telephone network should be responsible for the costs they actually cause" – and not more – "is sound from a public policy perspective and rings of fundamental fairness."[13] All of these concepts support the identification and establishment of a cost-based PIC-change charge. The single most noteworthy change to the telecommunications industry with respect to the PIC-change $5.00 safe harbor, on the other hand, is that it is no longer the case that development of a cost-based PIC change charge would "present a difficult challenge for carriers."[14]

Although incumbent LECs continue to "argue[] that the $5 ceiling on PIC-change charges remains reasonable,"[15] the Commission's own findings lead to a contrary result. In

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9 MTS and WATS Market Structure (Third Report and Order), 93 F.C.C.2d, ¶ 54 (1982).

10 Id., ¶ 35.

11 Id., ¶ 76.

12 Id., ¶ 113.

13 MTS and WATS Market Structure (Memorandum Opinion and Order), 97 F.C.C.2d 682, ¶ 7 (1983).

14 MCI Telecommunications Corporation v. U.S. West Communications, Inc., et al. (Memorandum Opinion and Order), 15 FCC Rcd. 9328, ¶ 9 (2000).

15 *NPRM*, ¶ 7.

particular, the Commission has recognized that incumbent LECs have realized "substantial cost savings" from the automation of their PIC-change processes over the past fifteen years,"[16] and has specifically noted that

[16] MCI Telecommunications Corporation v. U.S. West Communications, Inc., et al. (Memorandum Opinion and Order), 15 FCC Rcd. 9328, ¶ 9 (2000).

> At the time the Commission approved the $5 PIC-change rate in 1984, most PIC-change requests initiated by IXCs were required to be either faxed or mailed to the defendants and were processed on an individual request basis, typically requiring up to two weeks to complete. MCI's witnesses persuasively demonstrate that the defendants now deploy automated systems permitting them to process PIC changes virtually instantaneously with on-line requests from the IXCs that require little or no manual labor from the LECs. In fact, with respect to one defendant, Bell Atlantic, MCI produced direct evidence indicating that Bell Atlantic's actual PIC-change costs are significantly less than $5.[17]
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> . . .
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> Defendants . . . assert that the automation has not resulted in 'cheaper' service . . . . We find defendants' assertions in this regard to be unsupported in the record. Based on the record before us, we are satisfied that the defendant LECs have, in fact, realized substantial cost savings from the automation of their PIC-change processes over the past fifteen years.[18]

Thus, the Commission has already disposed of the incumbent LECs' rather strained attempts to deny that the costs of executing PIC changes have drastically decreased.[19]

Indeed, despite their unsupported assertions to the contrary, conflicting statements offered by the incumbent LECs themselves, as well as the evolving business practices of many incumbent LECs, provide dramatic proof that the present $5.00 safe harbor is extraordinarily unlikely to represent a true cost-based assessment. As Verizon admits, for example, as far back as

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[17] MCI Telecommunications Corporation v. U S West Communications, Inc., et al., (Memorandum Opinion and Order), 15 FCC Rcd. 9328, ¶ 8

[18] Id., ¶ 9.

[19] *See, e.g.,*Comments of SBC Communications, Inc., RM-10131, CompTel Petition for Rulemaking to Re-examine Presubscribed Interexchange Carrier-Change Charges, p. 1 ("although there has been increased mechanization of the process when PIC-change requests are received from IXCs, that mechanization was designed primarily to allow for *faster* processing of PIC-change requests, not to reduce costs.); Reply Comments of SBC Communications, Inc., RM-10131, CompTel Petition for Rulemaking to Re-examine Presubscribed Interexchange Carrier-Change Charges, p. 1 ("The mere reduction of SNET's PIC-change charge [to $1.49] more than five years ago is hardly evidence to support a general reduction in the $5.00 safe harbor.")

seven years ago, Bell Atlantic determined that "the weighted cost of a PIC change (taking both automated and [the more expensive] manual PIC changes into account)" was already under $5.00.[20]

In light of the Commission's pro-consumer and pro-competitive philosophies, there has never been a policy justification for establishing other than a cost-based PIC-change charge. In light of technological advances (coupled with the compilation of nearly two decades of incumbent LEC cost data), there is now no technological justification for maintaining the present cost-plus PIC change safe harbor. In short, it is time for incumbent LECs to submit accurate PIC-change cost data to facilitate the Commission's adoption of a truly cost-based PIC change charge.

[20] Opposition of Verizon to CompTel Petition for Rulemaking to Re-examine Presubscribed Interexchange Carrier-Change Charges, p. 4. Notably, Verizon unintentionally undermines two significant contentions of those incumbent LECs which continue to oppose the reduction of the PIC change safe harbor to cost-based levels. First, incumbent LEC calculation of the actual costs of executing a PIC change has not constituted a difficult or imprecise process for a number of years now. Second, given the rapidity at which technological advances are made to telecommunications networks, the PIC change cost which seven years ago was already under the $5.00 safe harbor is today most likely significantly lower than the safe harbor, resulting in a pure windfall profit to those incumbent LECs which continue to assess competitors the safe harbor amount.

As noted above, record evidence demonstrates that the Commission has held Verizon's actual PIC change costs to be "significantly less than $5.00",[21] Southern New England Telephone's PIC change charge has been set at $2.30 for the previous five years, and BellSouth's present PIC change charge is set at $1.49. It is thus simply not credible that the costs of executing PIC changes for the major incumbent LECs, those responsible for the vast bulk of PIC changes, even approach the present safe harbor level. Yet these entities continue to threaten the Commission that if they are forced to undertake a cost showing, PIC change costs will likely *exceed* the present $5.00 safe harbor.[22] The Commission should not bow to the rhetoric of the incumbent LECs, nor should it disregard their clear statements which reveal the manner in which they intend to document PIC change costs in excess of $5.00 -- by including in cost calculations expenses associated with activities wholly separate from the execution of PIC changes.

As the incumbent LEC comments in opposition to CompTel's Petition for Rulemaking make clear, the PIC change charge is presently being utilized by incumbent LECs to recover significantly more than costs associated with executing a PIC change. Specifically, incumbent LECs are clinging to the PIC change safe harbor amount, using the $5.00 safe harbor to recoup costs associated not with the execution of PIC changes but rather with the investigation of slamming complaints. SBC brazenly admits that "the $5.00 PIC-change charge currently is the only mechanism for ILECs to recover the costs associated with responding to customer inquiries and conducting slamming investigations."[23] Attempting to deflect attention from the only relevant issue,

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[21] MCI Telecommunications Corporation v. U.S. West Communications, Inc., et al (Memorandum Opinion and Order), 15 FCC Rcd. 9328, ¶ 8 (2000).

[22] *See, e.g.,* Comments of SBC Communications, Inc., RM-10131, CompTel Petition for Rulemaking to Re-examine Presubscribed Interexchange Carrier-Change Charges, p. 2.

[23] Comments of SBC Communications, RM-10131, CompTel Petition for Rulemaking to Re-

SBC continues

> As the Commission well knows, the explosion of 'slamming' cases in recent years has created significant customer concern and confusion over unauthorized PIC changes. ILECs incur real costs in responding to customer inquiries and concerns regarding unauthorized PIC changes, and the amount of time spent with customers has only increased in the wake of the Commission's changes to its slamming rules. *The $5.00 PIC-change charge currently is the only mechanism for ILECs to recover these costs.*[24]

examine Presubscribed Interexchange Carrier-Change Charges, p. 2.

[24] Id., p. 5 (emphasis added).

What SBC neglects to mention, and what the Commission obviously also forgets when it incomprehensibly fails to unequivocally answer in the negative "whether or not it is appropriate for incumbent LECs to recover the costs of administering slamming complaints through the PIC-change charge,"[25] is that *all carriers*, not merely incumbent LECs, incur real costs in responding to customer inquiries and concerns regarding unauthorized PIC changes and *all carriers* have experienced an increase in the amount of time spent with customers as a result of the Commission's slamming rules. Those rules impose no burdens on incumbent LECs which are not also borne by all other carriers, and absolutely no justification exists pursuant to which incumbent LECs alone might be allowed to minimize their own costs of complying with those rules by over-recovering PIC change costs from their competitors.

The Commission has specifically held that "the rules we adopt require all carriers, regardless of size, to take precautions to guard against the harm to consumers that is caused by slamming. While the rules we adopt may impose some costs on carriers, these are necessary costs. We cannot lower the costs for carriers in order to promote competition at the expense of the consumer."[26] These costs include necessary investigations into slamming allegations by all authorized carriers, whether incumbent LECs, competitive LECs or interexchange carriers:

> The rules adopted in the *Section 258 Order* also require the authorized carrier to conduct investigations to provide an alleged unauthorized carrier with the opportunity to prove that it did not slam the customer.[27]

The Commission could not, without directly undermining the Telecommunications Act's

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[25] *See,* NPRM, ¶ 10.

[26] Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996; Policies and Rules Concerning Unauthorized changes of Consumers Long Distance Carriers (Second Report and Order), 14 FCC Rcd. 1508, ¶ 191 (1998).

[27] Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996; Policies and Rules Concerning Unauthorized changes of Consumers Long Distance Carriers (First Order on Reconsideration), 15 FCC Rcd. 8158, ¶ 3 (2000).

procompetitive underpinnings, sanction the recovery by incumbent LECs of such slamming-related investigatory costs through the PIC-change safe harbor. The principle of competitive neutrality dictates that when an incumbent LEC is the "authorized carrier," it, like any other authorized carrier, must bear its own investigatory costs.

Likewise, the Commission has directed "all providers of telephone exchange and/or telephone toll service within the United States" to file "a Telecommunications Slamming Complaint Reporting Form" advising the Commission of slamming allegations lodged against it and investigated.[28] With regard to this reporting requirement, an incumbent LEC, like any other reporting carrier, is responsible for investigating merely the slamming complaints lodged against it. And like all other reporting carriers, incumbent LECs are required to report to the Commission the "Names of carriers alleged to have slammed one of your local exchange service subscribers".[29] Once again, there is no logical basis for differentiating between such reporting costs when incurred by incumbent LECs as opposed to other reporting carriers, and certainly no reason to sanction incumbent LEC padding of PIC change charges to recover such costs.

In establishing the reporting requirement, the Commission has noted that

> commenters contend that requiring each carrier to submit reports on the number of slamming complaints that it receives would create serious burdens for the

[28] Pursuant to the instructions for completion of Telecommunications Slamming Complaint Reporting Form FCC 478, "a slamming complaint is considered to have been 'investigated' by the carrier when the reporting entity has made a systematic inquiry into the consumer's allegation that *the reporting entity* has changed his/her preferred carrier without his/her permission."

[29] FCC Form 478, Block 4.

> Commission and compliant carriers alike. We do not believe the reporting requirement adopted in this Order will impose significant additional costs or administrative burdens on carriers. . . . We do not believe that we are requiring carriers to keep information that they would not otherwise already keep.[30]

Thus, the costs of complying with the Commission's slamming rules affect all carriers. Indeed, while incumbent LECs may have higher aggregate compliance costs arising from their much larger customers bases generally; the Commission has never given any indication that it would permit the recovery of such costs from competitors through higher than necessary PIC change charges, nor could it have done so without violating the Telecommunications Act..

[30] Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996; Policies and Rules Concerning Unauthorized changes of Consumers Long Distance Carriers (Third Report and Order), 15 FCC Rcd. 15996, ¶ 93 (2000).

In determining the actual costs associated with a PIC change, the only function of an incumbent LEC under the Commision's slamming rules which is relevant is its role as an "executing carrier". Section 64.1100(b) defines an "executing carrier" as "any telecommunications carrier that effects a request that a subscriber's telecommunications carrier be changed."[31] Aside from the costs associated with the technological switch of the customer from one carrier to another, the "real costs in responding to customer inquiries and concerns regarding unauthorized PIC changes, and the amount of time spent with customers" lamented by SBC actually encompass only the following: "carriers must inform subscribers who believe that they have been slammed of their right to file a complaint with the appropriate governmental entity."[32] Unless the incumbent LEC is also the "authorized carrier", there will be no additional investigatory costs (and as noted above, if the incumbent LEC is the authorized carrier, such costs fall to it as a cost of doing business). SBC is well aware of this, having already been so advised by the Commission.[33]

Finally, it should be noted that the Commission has affirmatively prohibited executing carriers from undertaking investigatory actions on its own initiative:

> We also have concerns that an executing carrier's verification of an already verified carrier change could serve as a de facto preferred carrier freeze, even in situations in which the subscriber has not requested such a freeze. . . . The verification of a carrier change request by an executing carrier is similar to a preferred carrier freeze because it would require the subscriber first to confirm with the submitting carrier that he or she wishes to make a carrier change, and then to contact the executing

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[31] 47 C.F.R. § 64.1100(b).

[32] Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996; Policies and Rules Concerning Unauthorized changes of Consumers Long Distance Carriers (Third Report and Order), 15 FCC Rcd. 15996, ¶ 86 (2000).

[33] Id., ¶¶ 84, 86 ("SBC also requests clarification that . . . the LEC, acting as executing carrier, is no longer obligated to investigate or make a determination as to the validity of the initial carrier change. . . . We note that SBC's second clarification request regarding the executing carrier's role in investigating slamming allegations was made in response to the Commission's prior liability rules, which were superceded by the liability rules adopted in the *First Reconsideration Order*."

carrier to confirm that such a change was authorized. By requiring consumers to take affirmative action in order to change their carriers, preferred carrier freezes provide consumers with additional protection from slamming. But because preferred carrier freeze by their very nature impose additional burdens on subscribers, freezes should only be placed as a result of consumer choice. . . . The imposition of an 'unauthorized preferred carrier freeze' by an executing carrier would take away control from the consumer. We therefore find that, even where verification by an executing carrier would not result in undue delay or denial of a carrier change, such verification is prohibited.[34]

[34] Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996; Policies and Rules Concerning Unauthorized changes of Consumers Long Distance Carriers (Second Report and Order), 14 FCC Rcd. 1508, ¶ 100 (1998).

Thus, putting aside the actual costs associated with executing a PIC change, the Commission's slamming rules and regulations impose no costs upon incumbent LECs which do not affect generally all telecommunications carriers. There can be, therefore, no justification for allowing incumbent LECs to recover such generally applicable costs through PIC change charges, especially when such extraneous costs would be borne by incumbent LECs' competitors, and ultimately the consumers seeking to exercise their freedom to choose a telecommunications service provider.[35]

[35] ASCENT also notes that in light of the Commission's commitment to safeguarding the right of consumers to configure their telecommunications service relationships as they see fit, there can be no such thing as an "excessive" PIC change. *See* NPRM, ¶ 17. The actual costs of executing a PIC change will not vary, regardless of the number of times a consumer exercises his or her right to change carriers. In order to protect the consumer's right to choose carriers freely, it is imperative that only the actual costs associated with executing the PIC change may be imposed, whether the consumer is changing carriers for the first – or the fifth – time.

In light of the incumbent LEC commenters' admissions that the PIC change charge is presently being utilized to recover costs related to compliance with slamming rules generally, there can be no question that "market forces will not ensure reasonable PIC-change charges."[36] These entities, which continue to execute the vast bulk of PIC changes, are telling the Commission flat out that they have been imposing for some time artificially invlated PIC change charges in order to recover other -- unrelated -- costs of doing business from their competitors and the end-user customers of their competitors. The Commission must act to bring PIC change charges to actual cost; in connection therewith, it is imperative that incumbent LECs be required to submit detailed cost studies in order that the Commission may determine the costs actually associated with merely the execution of a PIC change. Given that incumbent LECs have benefitted from an above-cost PIC change charge for nearly two decades, in large measure through their reluctance to provide meaningful cost data, the Commission should act to establish an interim safe harbor amount which is likely to be more reflective of actual costs. ASCENT suggests that until such time as a cost proceeding may be concluded, that the Commission set an interim PIC change safe harbor at the $1.49 amount set by at least one major incumbent LEC more than five years ago. While even this safe harbor amount ultimately may be proven to be unduly high, it is preferable for the Commission to provide some measure of relief to the competitors of incumbent LECs and their end-user customers rather than to allow an above-cost PIC change charge, already nearly two decades old, to continue during the pendency of the necessary cost proceedings..

Respectfully submitted,

ASSOCIATION OF COMMUNICATIONS ENTERPRISES

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[36] *NPRM*, ¶ 16.

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June14, 2002

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